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In the Supreme Court of the United States

October Term, 1984

40 EASTCO,
Petitioner,

-v.-

THE CITY OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: January 9, 1985

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QUESTION PRESENTED

1. Does a change in a municipal zoning ordinance which interferes with a property owner's investment-backed expectations and prevents him from realizing a reasonable return on his investment deprive him of the "economically viable" use of his property so as to create an unconstitutional taking?

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In the Supreme Court of the United States

October Term, 1984

40 EASTCO,
Petitioner,

v.

THE CITY OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

40 Eastco ("petitioner") respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 12, 1984.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (1a–12a)[1] is reported at 746 F.2d 135. The opinion of the United States District Court for the Southern District of New York (13a–37a) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 12, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1] References to a page number followed by "a" herein are to the Appendix attached hereto.

Statutes Involved

The Fifth and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix.

Statement of the Case

Petitioner's (plaintiff below) complaint alleges that it obtained a permit from respondent New York City to construct a major office building on a property that it owned on the block located between 51st and 52nd Streets and Park and Madison Avenues in midtown Manhattan. The City then amended its zoning laws to drastically reduce the size of the building that could be constructed on the property and cancelled the permit. Whereas petitioner could have earned a reasonable return on its investment in the property by constructing a building allowed as of right under the old zoning in effect when it acquired the property, it cannot earn such a return on the smaller building allowed under the new zoning.[2]

Recognizing that these allegations must be accepted as true on the defendant City's motion to dismiss the complaint, the District Court nevertheless granted that motion, and the Court of Appeals affirmed, on the ground that interference with petitioner's investment-backed expectation of a reasonable return on its investment did not constitute a taking. The Court of Appeals reasoned that the property, although not economically viable to petitioner, would be economically viable to a different owner with a reduced investment in it. In other words, the Court held that "economic viability" — which it acknowledged this Court has established as the governing standard for a taking — is to be measured in the

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[2] The basis for federal jurisdiction in the District Court was under the federal question statute, 28 U.S.C. § 1331, since plaintiff alleged claims arising under the Fifth and Fourteenth Amendments to the Constitution.

abstract by whether the property can be utilized by any owner with any hypothetical investment in a gainful fashion, regardless of the particular affected owner's investment-backed expectations and ability to earn a reasonable return on his investment. Thus, the Court reasoned that petitioner could sell its property at a loss and the purchaser (having an investment lower than petitioner) could construct the smaller building allowed under the new zoning with a reasonable return on the purchaser's investment.

This reasoning is directly contrary to a decision of the Sixth Circuit Court of Appeals in a similar zoning case in which this Court granted certiorari this term. *Hamilton Bank* v. *Williamson County Regional Planning Commission*, 729 F.2d 402 (6th Cir.), *cert. granted*, 53 U.S.L.W. 3202 (1984). The Court in *Hamilton* has agreed to hear a virtually identical question to the one presented here:

> "May regional Planning Commission that has been found to have acted in good faith, granting to developer due process in enforcement of validly enacted zoning ordinances and subdivision regulations, be found to have violated developer's Fifth Amendment rights by temporary interference with profit-backed expectations?" 53 U.S.L.W. 3202 (October 2, 1984).[3]

The decision below is also contrary to this Court's recent holdings applying the taking doctrine to land use regulation. *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978).

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[3] The Court also agreed in *Hamilton* to hear a question relating to the award of damages as a remedy for a taking. This question will not be reached unless the Court finds that a taking occurred, a decision that would be contrary to the decision in this case.

Proceedings Below

Petitioner filed its complaint on September 10, 1982. The United States District Court for the Southern District of New York, Hon. Vincent L. Broderick, granted the City's motion to dismiss petitioner's complaint for failure to state a claim on February 7, 1984. (38a). The Court of Appeals affirmed the District Court's decision in an opinion dated October 12, 1984. (1a–12a).

The Court of Appeals recognized that a taking occurs when a zoning change makes a property no longer "economically viable," *Agins* v. *City of Tiburon*, *supra*, 447 U.S. at 260, but held that the zoning change at issue here did not constitute a taking, even assuming that it made the property no longer economically viable to petitioners and even though it interfered with their investment backed expectations. The Court explained that:

> "'the key question' in determining whether a property restriction is so economically burdensome as to constitute a taking is not whether the regulation allows operation of the property as 'a profitable enterprise' for the owners, but whether others 'might be interested in purchasing all or part of the land' for permitted uses." (9a).

The Court held that there was no genuine issue of fact that the property retained economic viability, regardless of its inability to provide a reasonable return to petitioner. (11a). In short, according to the Court of Appeals, economic viability is independent of investment-backed expectations and return on investment to the owner actually affected by a zoning change, and so long as a rezoned property can be sold at a loss for some use by another there has been no deprivation of economic viability.

Point I

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH A DECISION BY THE SIXTH CIRCUIT NOW BEFORE THIS COURT

Hamilton was decided by the Sixth Circuit diametrically opposite to this case. The standard for determining whether an unconstitutional taking occurred applied by the Sixth Circuit was whether the owner could develop its property under new zoning at a reasonable return or profit.

In *Hamilton*, rezoning substantially reduced the number of residential houses permitted in plaintiff's planned housing development. There was unchallenged testimony that under the reduced density requirements plaintiff would sustain losses in completing the development and, therefore, that the land was not viable for the plaintiff. 729 F.2d at 406. The Court concluded that "the property had no remaining economically viable use," *id.*, and upheld the jury's answer to a special finding that there had been a taking. The Court explained that:

> "[T]he Supreme Court in zoning cases has engaged in an economic analysis of the degree of interference with 'investment-backed expectations.'" *Id.* at 407.

It found that, under *Penn Central*, a taking had occured because the plaintiff developer contemplated the larger number of residential units previously permitted by the Planning Commission:

> "This was the developers' 'primary expectation concerning the use of the parcel,' *Penn Central*, 438 U.S. at 130, 98 S.Ct. at 2662, and was backed by considerable investment in land and improvements." *Id.*

Moreover, it is self-evident that the rezoned property in *Hamilton* could have been sold at a loss to another who could have developed it on the reduced basis at a reasonable return or profit. While the Second Circuit characterized that as "key" to economic viability, the Sixth Circuit implicitly held that this was irrelevant to economic viability.

Point II

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE CONTROLLING DECISIONS OF THIS COURT

Agins v. *City of Tiburon*, *supra*, considered rezoning which limited the extent of development of plaintiff's property. This Court stated the general rule as follows:

> "The application of a general zoning law to particular property effects a taking if the ordinance...denies an owner *economically viable use of his land*, see *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 138, n. 36 (1978)." 447 U.S. at 260 (emphasis added).

The Court, contrary to the Court of Appeals here, made it clear that the test of a property's economic viability to the property owner affected by the zoning change is his investment-backed expectations and ability to earn a reasonable return on his investment. Thus, this Court made plaintiffs' ability to pursue their "reasonable investment expectations" the basis of its decision. 447 U.S. at 262. No taking was found because the owners "never have sought approval for development of their land" (*id.* at 257) and remained "free [after the rezoning] to pursue their reasonable investment expectations

by submitting a development plan to local officials." *Id.* at 262.

Penn Central Transportation Co. v. *New York City*, *supra*, cited by this Court in the above quotation respecting the meaning of economic viability, concerned New York City's designation of the Grand Central Terminal as a landmark site under its Landmarks Preservation Law. The basis of the decision was that, unlike the present case, the law did not interfere with plaintiff's "primary expectation concerning the use of the parcel" and "[m]ore importantly [plaintiff's ability] not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment." 438 U.S. at 136. As a result, the law was upheld as constitutional.

This Court repeatedly stressed that interference with "distinct investment-backed expectations" was central to determining when a taking occurs. *Id.* at 124, 127. And in applying this principle to the record before it, the Court again and again emphasized that a reasonable return on investment was the core concept. *Id.* at 129; 129 n.26. The Court explained:

> "We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a *gainful* fashion." *Id.* at 138, n.36 (emphasis added).

The dissent agreed with the majority on the point that ability to earn a reasonable return was the proper constitutional standard:

> "Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property. The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, *the inability of the owner to*

> *make a reasonable return on his property* requires compensation under the Fifth Amendment." *Id.* at 149 (last emphasis added).[4]

Under the Court of Appeals' rationale, so long as a zoning regulation does not prevent an owner from constructing a building of some sort or making some other use of his property, the property is "economically viable." This is true, according to the Court, even if the regulation makes such development commercially impractical and any permitted use would result in substantial loss to the owner, or, by the same token, inability to earn a reasonable return.

As this Court's decisions demonstrate, however, the commonly accepted measure of a property's economic viability in any business is its potential use and profitability. Commercial real estate is only purchased and developed if there is an expectation that the property will yield a reasonable return on investment. If a reasonable return cannot be obtained, the property will not be developed — it is *not* economically viable to the affected owner.

Put another way, as long as the property can be sold — at a loss — to someone who can use the property given his smaller investment, then according to the Court of Appeals, there has

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[4] The Court of Appeals erroneously tried to distinguish *Penn Central* as follows:

> "Because a reasonable return was assured, reasoned the Court, a taking certainly had not occurred. We do not interpret that holding as stating a principle, as appellants contend, that a taking occurs where there is interference with a reasonable return." 8a, n.1.

But that is logically incorrect. Obviously, if ability to earn a reasonable return is central to precluding a taking, inability to earn such a return is central to qualifying for a taking. Penn Central failed to succeed in its constitutional challenge precisely for the reason that it was able to earn a reasonable return on its investment.

been no deprivation of economic viability. By this test no zoning change, other than zoning which forbids *all* uses, would comprise a taking. That has not been the meaning of "economic viability" in this Court's decisions and is a distortion of plain English.

Point III

THIS COURT SHOULD, AT A MINIMUM, HOLD THIS PETITION UNTIL IT DECIDES THE VIRTUALLY IDENTICAL ISSUE IN HAMILTON

If this Court does not grant *certiorari*, it should at least defer deciding this petition until after it decides *Hamilton*, because the issue presented by this petition is virtually identical to the question quoted above that has already been accepted by this Court in *Hamilton*. The *Hamilton* decision is, therefore, likely to be controlling in this case, and this Court, if it does not decide to grant *certiorari* in this case as well, should remand to the Second Circuit for a decision in light of the forthcoming *Hamilton* decision.

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Dated: January 9, 1985

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1145 — August Term

(Argued: June 28, 1984 Decided: October 12, 1984)

Docket No. 84-7128

PARK AVENUE TOWER ASSOCIATES AND 40 EASTCO,
Plaintiffs-Appellants,

-v.-

THE CITY OF NEW YORK,
Defendant-Appellee.

Before:

KEARSE, PIERCE and SWYGERT,* *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Broderick, *Judge*, granting summary judgment on behalf of the City of New York and dismissing a complaint which alleged an unconstitutional taking of property without just compensation.

Affirmed.

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* Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

PETER M. FISHBEIN, New York, N.Y. (Gerald Sobel, Maris Veidemanis, Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., of counsel,) for *Plaintiffs-Appellants.*

FREDERICK A. O. SCHWARZ, JR., Corporation Counsel, New York, N.Y. (Leonard Koerner, Ronald E. Sternberg, Albert G. Fredricks, Michael S. Adler, New York., of counsel), for *Defendant-Appellee.*

PIERCE, *Circuit Judge:*

Appeal from a judgment of the United States District Court for the Southern District of New York, Vincent L. Broderick, *Judge,* entered February 10, 1984, granting summary judgment on behalf of the City of New York ("the City") and dismissing the complaint. Plaintiffs alleged in their complaint that certain zoning changes adopted by the City deprived them of a "reasonable return" on their investments in several properties and, therefore, amounted to a taking without just compensation in violation of the United States Constitution. We agree with the district court that plaintiffs' claims are untenable as a matter of law and that there does not exist a dispute about material facts making summary judgment inappropriate. Consequently, we affirm the district court's judgment dismissing the complaint.

I. BACKGROUND

Appellants Park Avenue Tower Associates and 40 Eastco (respectively "Park Avenue Tower" and "Eastco"), owners of certain real estate in Manahattan, commenced this action on September 10, 1982, seeking declaratory and injunctive relief against the City on the ground that particular zoning

changes adopted by the City served to deprive them of property without just compensation in violation of the Fifth and Fourteenth Amendments. Appellants also advanced several state constitutional and statutory claims.

Park Avenue Tower acquired one of the subject properties (a parcel of land consisting of several lots located on the square block bordered by East 55th Street, East 56th Street, Park Avenue, and Madison Avenue in Manhattan) between January, 1981, and March, 1982, at a total cost of approximately fifty-one million dollars. The other property involved herein is owned by Eastco and consists of several lots located between East 51st and 52nd Streets, and Park and Madison Avenues. Eastco acquired this property between March, 1978, and June, 1982, at a total cost of approximately sixteen and one-half million dollars.

The zoning regulations in effect at the time appellants began purchasing the subject properties allowed the construction of buildings with a maximum floor area ratio ("FAR") of eighteen. FAR is the measure of the bulk of a building; the higher the FAR, the greater the rentable space that can be constructed on a given parcel of property.

According to the complaint, appellants acquired the properties intending to demolish the existing structures and to construct office buildings with the maximum eighteen FAR then allowed under the zoning provisions. Toward that end, they applied to the City for building permits, which the City issued between June, 1981, and May, 1982.

Several years before the permits were issued, City officials had become concerned that the quality of life in New York was threatened by the rapid rate and nature of construction taking place in the eastside, midtown area of Manhattan. *See* New York City Department of Planning, *Midtown Development*, at 11-12 (1981). In this connection, the New York City Planning

Commission, the agency of the City responsible for proposing and promulgating amendments to the zoning regulations, issued for public comment a draft report in June, 1980, proposing the creation of a Special Midtown District composed of stabilization, growth, and preservation areas. The stabilization area, which included appellants' properties, was designed to relieve pedestrian congestion and pressure upon inadequate transportation and other public facilities. The planners felt that overbuilding was causing these conditions. *Id.*

A major aspect of the proposed plan involved limiting the maximum bulk of new buildings constructed within the stabilization area. The bulk-restriction proposals, along with other aspects of the proposed amendments, were subject to extensive public comment and review between the time they first were proposed in public in June, 1980, and May, 1982, when they first were proposed in public by the City Board of Estimate. *See* New York Planning Commission, *Midtown Zoning* (1982).

As adopted, the zoning amendments lowered the maximum FAR within the stabilization area from eighteen to thirteen. In view of the new bulk restrictions, the City revoked appellants' building permits (prior to construction), since those permits were premised on a maximum permissible FAR of eighteen.

The gravamen of appellants' September 10, 1982 complaint was that the zoning change limiting the bulk of new buildings constituted an unconstitutional taking because it precluded appellants from constructing buildings that would provide "a reasonable return" on their investment. The complaint also alleged that the zoning changes "destroyed [the properties'] economic value."

On October 6, 1982, the City moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. In its moving

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papers, the City argued that a zoning change which precluded appellants from receiving a reasonable return on their prior investment did not, by itself, amount to an unconstitutional taking. As to the contention that the new limitations on bulk "destroyed [the properties'] economic value," the City submitted an affidavit by Lauren F. Otis, a registered architect who served as deputy director of the Manhattan Office of the City Planning Department and who was a major participant in the Midtown Development Project that produced the disputed zoning changes, stating that Park Avenue Tower would be able to construct a new thirty-one story office building on its parcel under the new zoning restrictions while retaining the existing small buildings. Otis also stated that Eastco could construct a building of at least thirty stories on its parcel. Finally, the architect asserted that "[t]he above-described buildings are characteristic of modern Midtown office buildings, with total floor area and floor sizes falling within the range established by Midtown office buildings under construction or recently completed." In response, appellants filed a memorandum of law in opposition to the City's motion. They did not, however, present any affidavits based on personal knowledge or other evidence to refute the architect's affidavit.

Judge Broderick heard oral argument on the City's motion to dismiss on January 7, 1983. Over one year later, on February 7, 1984, the district judge converted the City's motion to dismiss to a motion for summary judgment. After considering the affidavits submitted by the City in support of the motion, Judge Broderick ruled that appellants' inability to earn a reasonable return on their investments did not amount to an unconstitutional taking. In addition, referring to the Otis affidavit submitted by the City, he ruled that it was factually undisputed that the zoning changes would not "prevent either plaintiff from constructing a very substantial building on its

property." Having dismissed appellants' federal claim, the district court went on to dismiss the pendent state claims. Appellants do not challenge the dismissal of the pendent claims independently of their challenge to the dismissal of their constitutional claims.

On appeal, appellants make essentially two arguments. First, they renew their contention that a zoning change which prevents a reasonable return on an investment constitutes an unconstitutional taking of property. Second, they argue that even if the above proposition is incorrect, it nevertheless was improper for the district court to grant summary judgment here because there existed a substantial dispute about material facts. Because we hold (1) that the inability of appellants to receive a reasonable return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking, and (2) that there is not a factual dispute that appellants' properties retained their economic viability, we affirm the judgment of the district court.

II. DISCUSSION

In *Agins* v. *Tiburon,* 447 U.S. 255 (1980), the Supreme Court stated that the "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Id.* at 260 (citations omitted). Appellants do not dispute that the zoning changes herein advance legitimate state interests. Instead, they base their claim on the second factor of the *Agins* formula — economic viability. They argue that the economic viability is not, and indeed cannot be, satisfied where a zoning change prevents investors from receiving a reasonable return on their investments.

We do not find merit in this contention. Neither of the two cases upon which appellants rely, *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), and *Penn Central Transportation Co.* v. *New York,* 438 U.S. 104 (1978), holds that a taking occurs where a zoning change prevents an investor from receiving a resonable return on its investment.[1] Moreover, as the

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[1] At issue in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), was a state statute preventing plaintiff coal companies, which owned rights to mine coal under certain homes, from conducting mining activities that could cause the homes to subside. Justice Holmes, writing for the Court, held that the statute amounted to an unconstitutional taking because it did "not disclose a public interest sufficient to warrant so extensive a destruction of the [coal companies'] constitutionally protected rights." *Id.* at 414. As one comment has noted, *Pennsylvania Coal* stands "for the proposition that, where the ordinance is designed to protect merely private rights, the economic harm of the regulation will likely weigh heavily in the court's balancing of the factors." Comment, 48 Brooklyn L. Rev. 137, 164-65 (1981) (footnote omitted). Nowhere does *Pennsylvania Coal* hold, as appellants' contend, that the inability of an investor to receive a "reasonable return" on its investment as a result of a regulatory restriction amounts to an unconstitutional taking.

The Supreme Court's decision in *Penn Central Transp. Corp.* v. *New York*, 438 U.S. 104 (1978), similarly is not supportive of appellants' position. Contrary to appellants' assertion, the Court in *Penn Central* did not hold that "a reasonable return on investments" was a factor — much less the only factor — in determining whether a taking had occurred. Rather, at issue in *Penn Central* was a state law (not a zoning provision) that assured owners affected by the restrictions a reasonable return on their investments. The New York Court of Appeals, from which the plaintiffs in *Penn Central* had appealed, had found that the plaintiffs could receive a reasonable return despite the statutory restrictions on their property. In reviewing the case, the Supreme Court accepted the state court's finding of fact as to reasonable return. Because a reasonable return was assured, reasoned the Court, a taking certainly had not occurred. We do not interpret that holding as stating a principle, as appellants contend, that a taking occurs where there is interference with a reasonable return. In short, neither *Pennsylvania Coal* nor *Penn Central* requires the approach urged upon us by appellants.

Supreme Court observed recently, "deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). In support of this proposition, the Court cited *Andrus* v. *Allard*, 444 U.S. 51 (1979), a case which raised the issue whether a regulation that completely prohibited commercial traders of Indian artifacts from selling, trading, importing or exporting certain bird-part artifacts owned by the traders constituted a taking. In holding that the traders had not been subjected to an unconstitutional taking, the Court noted as follows:

> [L]oss of future profits — unaccompanied by any physical property restrictions — provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

Id. at 66.

More recently, this court rejected the notion that loss of profit — much less loss of a reasonable return — alone could constitute a taking. In *Sadowsky* v. *New York*, 732 F.2d 312 (1984), the court stated that "regarding economic impact, it is clear that prohibition of the most profitable or beneficial use of a property will not necessitate a finding that a taking has occurred." *Id.* at 317. The crucial inquiry, stated the court, is not whether the regulation permits plaintiffs to use the property in a "profitable" manner, but whether the property use allowed by the regulation is sufficiently desirable to permit property owners to "sell the property to someone for that use." *Id.* at 318. Similarly, in *Pompa Construction Corp.* v. *Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983), in which the

Agins formulation expressly was applied, the court emphasized that "the key question" in determining whether a property restriction is so economically burdensome as to constitute a taking is not whether the regulation allows operation of the property as "a profitable enterprise" for the owners, but whether others "might be interested in purchasing all or part of the land" for permitted uses. *Id.* at 424.

Appellants' theory is undermined further by the legion of cases that have upheld regulations which severly diminished the value of commercial property. For example, in *Hadacheck* v. *Sebastian*, 239 U.S. 394, 405 (1915), the Supreme Court upheld a restriction that devalued property by approximately ninety percent. Similarly, in the seminal zoning case, *Euclid* v. *Ambler Realty Corp.*, 272 U.S. 365, 384 (1926), the Court sustained a zoning regulation enacted after plaintiff acquired the property, even though the restriction reduced the value of the property by seventy-five percent. In *Pompa,* 706 F.2d at 420 n.2, 424, we held that a taking had not occurred, even if we accepted the assertion that a use restriction devalued property by approximately seventy-seven percent. Herein, appellants did not allege that their properties had suffered a reduction in value in any way comparable to the reductions in *Hadacheck, Euclid* or *Pompa.*

Significantly, appellants have stated their claims in terms of *return on investment* rather than *reduction in the value* of the properties. This recharacterization of a taking claim, however, does not distinguish appellants' claims from the above-cited cases. As the district judge noted, the suggestion that the City may not cause the loss of a reasonable return is merely another way of arguing that it may not impair the value of the property. *Accord, Haas* v. *San Francisco*, 605 F.2d 1117, 1120-21 (9th Cir. 1979) ("Haas' argument that it cannot recover its . . . investment by constructing low-rise apartment units on the land

merely restates the undisputed fact that the value of the property in Haas' hands had been significantly diminished by the regulations .... Haas [cannot] transform a regulation into a taking by recharacterizing the diminution of the value of its property as an inability to obtain a favorable return on its investment."), *cert. denied,* 445 U.S. 928 (1980).

In addition to being inconsistent with the case law, appellants' approach could lead to unfair results. For example, a focus on reasonable return would distinguish between property owners on the basis of the amount of their investments in similar properties (assuming an equal restriction upon the properties under the regulations), favoring those who paid more over those who paid less for the investments.[2] Moreover, in cerain circumstances, appellants' theory "would merely encourage property owners to transfer their property each time its value rose, in order to secure [in the event of a future, limiting zoning change] that appreciation which could otherwise be taken by the government without compensation." *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 1, 231 (1978). Finally, if courts focused upon preregulation value (as would be required under the reasonable return on investment method), most regulations "would constitute a taking, for the land value would reflect expected returns from the unregulated use." *Id.; see* Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis,* 76 Colum. L. Rev. 799, 818-19 (1976). In short, neither the case law nor common sense supports the reasonable return definition of economic viability urged upon us by appellants.

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[2] For example, assume that two investors purchased identical properties at the same time for identical development purposes, but one investor, more shrewd than the other, paid considerably less for the property. Under appellants' theory of takings, the City would have to compensate the investor who paid more but not necessarily the one who paid less, since the percentage "return" received by each would turn on the amount of their respective investment.

Alternatively, appellants argue that even if we reject their theory of the law of takings, we should reverse the district court because there exists a dispute about material facts, making summary judgment inappropriate. Upon reviewing the record, however, we conclude that this contention also is without merit. In their complaint, appellants did not allege any material facts as to a taking other than the allegations that the zoning changes prevented them from receiving a reasonable return on their investment and served to destroy the economic value of the properties nor did appellants assert anywhere in their complaint that the zoning changes precluded them from realizing any profit whatsoever from the properties.

In contrast, the City responded with the affidavit, made on personal knowledge, of Lauren F. Otis, an architect who was familiar with the zoning changes,[3] and who stated that Park Avenue Tower could construct on its parcel a new thirty-one story building while retaining the existing small buildings. As to Eastco, the affiant asserted that it could construct a building of at least thirty stories on its parcel of land. Otis further stated that the thirty-story buildings were within the size and range of midtown office buildings that recently had been completed or upon which construction recently had begun. Finally, the affidavit asserted that the above information refuted appellants' contention that the zoning changes had "rendered such Parcels unsuitable for any reasonable income productive or private use for which they are adapted and, thus, has destroyed their economic value." Instead of submitting affidavits of their own to challenge the Otis affidavit, appellants

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[3] Otis has both A.B. and Masters degrees in Architecture and worked for several major architectural firms for over twelve years before joining the Urban Design Group of the Department of City Planning in 1967. The affidavit stated that "[i]n order to determine the use to which Plaintiffs could now put their properties," Otis had "performed a zoning analysis indicating the general size and configuration of office buildings that could be built on these properties" pursuant to the new zoning provisions.

chose to rely solely on their pleadings and on a memorandum of law. This was insufficient to create a factual dispute about the economic viability of the property. *See, e.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968) ("Rule 56(e) . . . make[s] clear . . . that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him."); *Wyler* v. *United States*, 725 F.2d 156, 160 (2d Cir. 1983) ("Upon a defendant's motion for summary judgment supported by proof of facts entitling the movant to dismissal the plaintiff is required under Rule 56(e) to set forth specific facts showing that there is a general issue of material fact for trial of face dismissal."); *United States* v. *Pent-R-Books, Inc.*, 538 F.2d 519, 529 (2d Cir. 1976) ("If . . . the moving party does carry its preliminary burden, then, the opposing party may not defeat the motion by relying on the contentions of its pleading."), *cert. denied,* 430 U.S. 906 (1977). Consequently, the district court herein did not err in granting summary judgment on the City's behalf.

We have considered appellants' other contentions and we conclude that they also are without merit.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment granting the City summary judgment and dismissing the complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PARK AVENUE TOWER ASSOCIATES,
AND 40 EASTCO,
Plaintiffs,

-against-

82 Civ. 6027 (VLB)

CITY OF NEW YORK,
Defendant.

VINCENT L. BRODERICK, U.S.D.J.

MEMORANDUM ORDER

I.

Plaintiffs, owners of property on the east side of New York City in the midtown section, seek a declaratory judgment that amendments to New York City's Zoning Resolution are unconstitutional as applied to their properties, and they seek to enjoin enforcement of those amendments as to their properties. Defendant City of New York has moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Rule 12(b)(6), Fed.R.Civ.P. Affidavits have been submitted in connection with defendant's motion, and I have therefore construed it as a motion for summary judgment. This court has jurisdiction under 28 U.S.C. §1331.

II.

There is no material issue as to the following facts:

Plaintiff Park Avenue Tower Associates ("Park Tower") owns a parcel of land in the block bordered by East 55th and

56th Streets, and Park and Madison Avenues. It also owns the unused air rights on certain adjoining properties. Park Tower's parcel of land was acquired by it through purchases which were made between January 1981 and March 2, 1982. Its total cost of acquisition, including carrying costs and acquisition, to September 10, 1982, the date that this action was commenced, was approximately $51 million. The Park Tower parcel contains seven small buildings, but they do not provide any return on Park Tower's investment.

Park Tower's intention, in acquiring this parcel, was to demolish the existing structures and to construct an office building on the site under the provisions of the Zoning Resolution. The Zoning Resolution as it stood during the period of acquisition would have permitted the construction of a building with a "floor area ratio" ("FAR") of 18. (FAR is a measure of the bulk of a building, expressed in total floor area as a multiple of the area of the underlying parcel of land.) Park Tower submitted to defendant detailed architectural plans for an office building it intended to construct with a FAR of approximately 18. On the basis of these plans a plaza proposed by it was approved on April 26, 1982, and on May 12, 1982 it received an excavation and foundation permit for the construction of an office building.

Plaintiff 40 Eastco owns a parcel of land in the block between East 51st and 52nd Streets, and Park and Madison Avenues. Plaintiff 40 Eastco acquired the components of its parcel between March 1978 and December 1979. In June 1982 40 Eastco acquired an additional adjacent lot and additional air rights with respect to this parcel. Its total cost of acquisition, including carrying costs and interest to the date this action commenced, was approximately $16.7 million. While there are six small buildings on the 40 Eastco parcel, they do not provide 40 Eastco with any return on its investment. Like Park Tower, 40 Eastco acquired its parcel with the intention

of demolishing the existing structures and constructing an office building with a FAR of approximately 18. It submitted comprehensive architectural plans for such a building to the City and on July 6, 1981 it obtained a building permit for construction of the building.

The laws which control the development of property in New York City are set forth in the Zoning Resolution. The New York City Planning Commission is the agency of the City which is authorized by the City charter to propose and promulgate amendments to the Zoning Resolution; the Board of Estimate of the City is empowered to review, and to approve or reject, such amendments.

In June 1980 the Planning Commission published a draft report with respect to proposed revisions of the Zoning Resolution which would entail the creation of a Special Midtown District in Manhattan, which would include stabilization, growth and preservation areas. The stabilization area of this proposed Special Midtown District included the parcels acquired by Park Tower and 40 Eastco. Between June 1980 and the late part of 1981 or the early part of 1982 various changes were made in the Planning Commission's proposals, and in the proposed amendments to the Zoning Resolution and the zoning map that were intended to implement those proposals. On March 16, 1982 the Planning Commission approved final amendments to the Zoning Resolution and the zoning map. On May 13, 1982 the Board of Estimate approved the amendments to the Zoning Resolution which established the Special Midtown District.

The Special Midtown District, which is of irregular shape, extends from Third Avenue on the east to Eighth Avenue on the west, and from 57th Street on the north to 31st Street on the south. The thrust of the amendments is to establish the

Special Midtown District and to provide stabilization, growth, and preservation areas within the district. Serious over-building had occurred in the so-called "stabilization area" within the Special Midtown District east of Sixth Avenue, resulting in pedestrian congestion, inadequate transportation facilities, and pressure upon public facilities and services. The amendments to the Zoning Resolution are intended to stabilize development in that area by reducing the maximum bulk of new buildings which can be constructed there and thus slowing the growth of population density. They are also designed to improve access to transportation facilities. Development has lagged in the so-called "growth area" west of Sixth Avenue, and the thrust of the Zoning Resolution amendments is to encourage growth in that area by increasing the maximum bulk of new buildings which can be constructed there.[1]

The proposed amendments to the Zoning Resolution with respect to the Special Midtown District were the subject of extensive public comment and review between the time they were first proposed and their final approval by the Board of Estimate in May 1982. In the course of this consideration they also underwent considerable modification.

Thus under the terms of the Zoning Resolution in effect prior to the establishment of the Special Midtown District the maximum permissible FAR for buildings constructed where plaintiffs' parcels are located was 15, although this could have been increased by 3, to 18, if certain public amenities such as urban plazas were included in the design for the construction.

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[1] The amendments to the Zoning Resolution also effected other changes which are not germane to this action. They established a so-called "preservation area," consisting of the midblock area between Fifth Avenue and Avenue of the Americas in the vicinity of the Museum of Modern Art, and of some 44 theaters.

The initial proposals for the Special Midtown District put forth by the Planning Commission in its draft report of June 1980 retained 15 as the maximum permissible FAR applicable to parcels such as plaintiffs', but altered the proposed rules with respect to building mass, and with respect to bonus increases in FAR for amenities. The June 1981 revision to the Planning Commission proposals reduced the maximum FAR applicable to plaintiffs' parcels to 12, with a possible bonus of 1 FAR for the inclusion of certain public amenities (for a maximum total of 13 FAR). The amendments as adopted by the Board of Estimate retained the limitation applicable to plaintiffs of 12 FAR, plus a possible 1 FAR bonus.

In the course of consideration of the amendments to the Zoning Resolution, the Planning Commission was urged, perhaps by the plaintiffs in this case, to include a "grandfather clause" which would permit builders or developers who had already embarked on a construction program to proceed on the basis of their expectations, which was the 15–18 FAR allowed by the Zoning Resolution prior to amendment rather than the 12 or 13 FAR provided for by the Special Midtown District amendments as adopted. Inclusion of such a "grandfather clause" was vigorously resisted by various proponents of the amendments, on the ground that it would defeat a basic purpose of the amendments, which was east side stabilization.

When the Planning Commission's amendments to the Zoning Resolution were adopted by the Board of Estimate on May 13, 1982, the building permits which had previously been issued to Park Tower and 40 Eastco were revoked.

Thus plaintiffs, who acquired their parcels in the expectation that they would be permitted to construct buildings which had floor area ratios of 18 times the area of their parcels, are limited under the Zoning Resolution as amended to constructing buildings with maximum FARs of 13. It is not possible for either Park Tower or 40 Eastco to comply with the

Zoning Resolution as amended and to use its parcel in any manner, whether by constructing a building or otherwise, which would provide it with a reasonable return on its investment.

This does not mean that the amended Zoning Resolution will prevent either plaintiff from constructing a very substantial building on its property. Under the Special Midtown District provisions of the Zoning Resolution, Park Tower may build as of right, on its parcel of 38,144 square feet, a 31-story office building standing 388 feet high, with a total floor area within the building of 488,460 square feet. Plaintiff 40 Eastco, with a parcel of 17,535 square feet, may build as of right on that parcel a 30-story office building standing 391 feet high with a total floor area of 227,955 square feet.[2]

The zoning changes reflected in the 1982 amendments to the Zoning Resolution directly addressed the problems which had been identified in the Special Midtown District. There was no untoward haste or inadequate public consideration before the amendments to the Zoning Resolution were adopted. They were adopted only after thorough analysis, and they were responsive to urgent identified public needs.

III.

Plaintiffs assert that the application to their properties of the amendments to the Zoning Resolution has operated to "take" those properties without just compensation in violation of the Fifth and Fourteenth Amendments. The reduced FAR levels

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[2] The additional property acquired by 40 Eastco in June 1982 is not included in the above analysis, and presumably would increase the size of the building which 40 Eastco could build.

provided by the zoning amendments will prevent plaintiffs from building to the extent they had planned. Plaintiffs will thereby be prevented from obtaining reasonable returns on their investments. This inability to earn reasonable returns on their investments evidences, plaintiffs urge, the unconstitutional "takings."

The pertinent words of the Fifth Amendment of the Constitution of the United States are: "nor shall private property be taken for public use, without just compensation." This prohibition applies to the states through the Fourteenth Amendment. *Chicago B&Q Railroad Co.* v. *Chicago*, 166 U.S. 226, 239 (1897); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 122 (1978).

The Supreme Court in *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), set down the test of whether the application of a zoning law to property within the zoning area effects a "taking".[3] This zoning regulation must "substantially advance legitimate state interests," and it must not deny an owner the "economically viable use of his land":

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[3] The impact of a restrictive zoning regulation upon a property is normally not in any literal sense a "taking," since there is no actual appropriation by the government of the property, nor is there an assumption by the government of its control or management. *See French Inv. Co., Inc.* v. *City of New York*, 39 N.Y.2d 587, 594-97, 385 N.Y.S.2d 5, 8-11 (1976). The rubric of "taking" is frequently used in federal cases, however, to describe what Judge Breitel has referred to as the "frustration of property rights." *French Inv. Co., Inc.* v. *City of New York*, *supra*, 39 N.Y.2d at 595, 385 N.Y.S.2d at 8. *See, e.g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"); *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *Haas* v. *City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979).

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.

Agins v. *City of Tiburon*, 447 U.S. at 260.

Plaintiffs do not suggest that the Special Midtown District amendments to the Zoning Resolution do not "substantially advance legitimate state interests." They concede that they do, and would undoubtedly also concede that they, as property owners in the stabilization area of the Special Midtown District, will benefit along with all other property owners from the reduction of East Side overcrowding and congestion, and from the improvement of transportation facilities, which are the objectives of the amendments.

Plaintiffs' emphasis is upon the second inquiry dictated by the *Agins* v. *City of Tiburon* standard: has the owner been denied "economically viable use of his land"? They assert that, in the context presented by their claims, the fact that they cannot realize reasonable returns upon their investments in their properties means that they have been deprived of the "economically viable use" of those properties.

Does the fact that a property owner whose property is impacted by a zoning ordinance cannot, as a result of that impact, realize a "reasonable return" on his investment in that property mean that the property owner has been denied the "economically viable use of his land"? In arguing that it does,

plaintiffs rely strongly on two cases: *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), and *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). Analysis of these cases is therefore appropriate.

1. *Pennsylvania Coal Co.* v. *Mahon.* This was essentially a suit between private parties who had effectively agreed by contract that one would have title to the surface of land and the other, who was the grantor, would, after giving notice to the surface owner, be permitted to mine coal which was below the surface. The plaintiffs (or their predecessors in interest) had received a deed with respect to the property from the coal company in 1878 which conveyed the surface of the property, but reserved to the coal company the right to remove the coal under the property. The deed provided that the "grantee takes the premises with the risk, and waives all claim for damages that may arise from the mining out the coal." (260 U.S. at 412).

In 1921 Pennsylvania enacted a statute which prohibited the mining of coal beneath houses in such a way as to cause those houses to subside. After the statute was enacted, the coal company gave notice to plaintiffs that it intended to mine coal pursuant to its retained rights under the deed to plaintiff.

On the predicate of the 1921 statute the plaintiffs sought to enjoin the coal company from mining under their property. The lower court denied an injunction, holding that if the statute were applied, it would be unconstitutional. The Supreme Court of Pennsylvania recognized that the Pennsylvania Coal Company had property and contract rights, but it held that the 1921 statute was a legitimate exercise of the police power and directed that an injunction issue.

Justice Holmes for the Supreme Court recognized that values incident to property could be reduced by the exercise of the police power without compensation being paid, but that

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there were limits to permissible reduction, and in determining the limits one looked, *inter alia*, at the extent of the reduction:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. at 413.

Justice Holmes found that the "extent of the taking" was great; that the statute purported "to abolish what is recognized in Pennsylvania as an estate in land — a very valuable estate — and what is declared by the Court below to be a contract hitherto binding the plaintiffs." With respect to the plaintiffs, Justice Holmes said that "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." *Id.* at 414.

That would have seemed to have disposed of the issues before the Court, but the opinion goes on to treat the general validity of the Pennsylvania statute, apparently in the nature of an advisory to interested parties:

> But the case has been treated as one in which the general validity of the act should be discussed. The Attorney

> General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. at 414.

Justice Holmes went on to say that, to the extent that the right to mine coal under streets or cities had been reserved, the statute limiting such mining could not stand:

> It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth* v. *Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. at 414-15.

Justice Holmes distinguished another Pennsylvania case, *Plymouth Coal Company* v. *Pennsylvania*, 232 U.S. 531 (1914), in which the Supreme Court upheld the right of the Pennsylvania legislature to require mine operators to leave barriers of coal along the line of adjoining properties. The measure was intended for the safety of miners, as a protection against the possibility that mines on the adjoining properties would be abandoned and would fill with water. This was intended as a "requirement for the safety of employees invited into the

mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415.

Justice Holmes stated the general rule that while property may be regulated, regulation that goes too far will constitute a "taking":

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. at 415.

Thus *Pennsylvania Coal Co.* stands for the propostition that where the effect of government regulation is substantially to wipe out a person's interest in property there is a "taking":

> *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially futhers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking" .... Because the statute made it commercially impracticable to mine the coal, ... and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, ... the Court held that the statute was invalid as effecting a "taking" without just compensation.

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104, 127-28 (1978). *See: French Investing Co., Inc.* v. *City of New York*, 39 N.Y.2d 587, 598, 385 N.Y.S.2d 5, 11 (1976) (Where City rezoned private parks as public parks to frustrate owner's plan to erect buildings thereon, the zoning amendment was "unreasonable and, therefore, unconstitutional because, without due process of law, it deprives the owner of all his property rights, except the bare title and a dubious future reversion of full use").

The holding in *Pennsylvania Coal Company* is consistent with that in other cases. *See, e.g., Armstrong* v. *United States*, 364 U.S. 40 (1960) (the complete destruction of a lien in property held a "taking"); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 35 (1908) (if restriction renders property wholly useless, compensation is required).

2. *Penn Central Transportation Co.* v. *New York City*. This case entailed the application of the New York City Landmarks Preservation Law in preventing the construction over Grand Central Terminal of a high rise building. Grand Central Terminal was designated a landmark under the New York City Landmarks Preservation Law (N.Y.C. Admin. Code, ch. 8-A, §205-1.0 *et seq.* (1976)), and the block in which it was situated was designated a landmark site. In 1968 Penn Central entered into a contract pursuant to which a multi-story office building was to be constructed above the terminal. The Landmarks Preservation Commission refused permission to construct the office building over the terminal. It was on the basis of this refusal that the plaintiffs sued in state court for declaratory and injunctive relief. While the trial court granted an injunction, it was reversed on appeal to the Appellate Division, and the New York Court of Appeals affirmed. Upon appeal the Supreme Court noted probable jurisdiction (434 U.S. 983 (1979)).

The Supreme Court affirmed. It found that the Landmarks Preservation Law had a public interest purpose, that the law's objective "of preserving structures and areas with special historic, architectural, or cultural significance" constituted "an entirely permissible government goal," and that the restrictions imposed were appropriate to secure the purposes of the law. The Court then looked further to determine whether the interference with the Grand Central property was of such

magnitude that "'there must be an exercise of eminent domain and compensation to sustain [it]'." (438 U.S. at 136, quoting *Pennsylvania Coal Company* v. *Mahon*, 260 U.S. at 413.) The record before the Court established that "the parcel of land occupied by Grand Central Terminal must in its present state be regarded as capable of earning a reasonable return" and that certain "transferable development rights afforded appellants by virtue of the Teminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal." *Penn Central Transportation Co.*, 438 U.S. at 129.

The restrictions imposed by the New York City Landmarks Law were, the Court concluded, substantially related to the public welfare. It further found that those restrictions permitted to plaintiffs "reasonable beneficial use of the landmark site," and that they also afforded to plaintiffs "opportunities further to enhance not only the Terminal site proper but also other properties." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. at 138.

It is not, therefore, the result in *Penn Central Transportation Co.* from which plaintiffs in this case take comfort. They cite *Penn Central Transportation Co.* for the principle that, in a zoning case such as this one, if the plaintiffs cannot realize a reasonable return on their investments, there is a "taking." They rely upon language used by Justice Brennan in his opinion for the Court. Thus Justice Brennan stated that on the record before the Court, "we must regard the New York City law as permitting [the plaintiff] not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. at 136.

There are two reasons why *Penn Central Transportation Co.* does not stand for the principle suggested by plaintiffs.

First, as both the majority opinion (by Justice Brennan) and the dissenting opinion (by Justice Rehnquist) take pains to point out, *Penn Central Transportation Co.* v. *New York City* was not a zoning case. It entailed the question of whether the application of New York City's Landmarks Preservation Law to Grand Central Terminal constituted a taking. Justice Brennan posed the issue in this wise:

> The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks — *in addition to those imposed by applicable zoning ordinances* — without effecting a "taking" requiring the payment of "just compensation." Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has "taken" its owners' property in violation of the Fifth and Fourteenth Amendments.

Penn Central Transportation Co. v. *New York City*, 438 U.S. at 107 (emphasis added). Justice Rehnquist distinguished the very issues involved in *Penn Central Transportation Co.* from those in a typical zoning case. He pointed out that zoning restrictions have general application to all property owners in a designated area, whereas under the New York City Landmarks Preservation Law individual buildings are singled out for separate treatment:

> Only in the most superficial sense of the word can this case be said to involve "zoning." Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value

> will more that likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), there is "an average reciprocity of advantage."
>
> Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial — in this case, several million dollars — with no comparable reciprocal benefits.

Penn Central Transportation Co. v. *New York City*, 438 U.S. at 139-40 (Rehnquist, J., dissenting).

Second, the law being challenged in *Penn Central Transportation Co.* — the New York City Landmarks Preservation Law — contains specific provisions which were designed to ensure that the owners of properties affected by it receive a "reasonable return" on their investments. These provisions provided, according to Justice Brennan, a major theme of the law:

> While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, *the major theme of the law is to ensure the owners of any such properties both a "reasonable return" on their investments* and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

Penn Central Transportation Co. v. *New York City*, 438 U.S. at 110 (emphasis added). The need to take into consideration these specific provisions with respect to "reasonable return" in deciding the issues presented in *Penn Central Transportation Co.* distinguishes that case from any zoning case that has come to my attention. Indeed the state legislation which authorized the adoption by New York City of the Landmarks Preservation Law contemplated that the impact of the law in certain circumstances might constitute a "taking":

> In addition to any power or authority of a municipal corporation to regulate by planning or zoning laws and regulations or by local laws and regulations, the governing board or local legislative body of any county, city, town or village is empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value. Such regulations, special conditions and restrictions may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. In any such instance such measures, if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation, which may include the limitation or remission of taxes.

N.Y. Gen. Mun. Law §96-a (McKinney 1977).

The Landmarks Preservation Law actually defines the "reasonable return" to which property owners affected by the law are entitled. It initially defines "reasonable return" in terms of "a net annual return of 6 per centum of the valuation of an improvement parcel," and defines "valuation" as "the

current assessed valuation established by the City, which is in effect at the time of the filing of the request for a certificate of appropriateness." It also makes specific provision for the situation where a different valuation may be established if the property has been sold:

> The Commission may make a determination that the value of the improvement parcel is an amount different from the assessed valuation where there has been a bona fide sale of such parcel . . . , as the result of a transaction at arms' length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. . . .

Chapter 8-a, N.Y.C. Admin. Code, ch. 8-A, §207-1.0v (2) (b) (1976).

Thus legislation making specific provision for "reasonable return" provided the context for the discussion and consideration of "reasonable return" in *Penn Central Transportation Co.* This discussion should not be taken out of context and applied in zoning contexts where there is no equivalent legislation and where the discussion would clearly not be applicable. One may not apply to a zoning situation principles developed in a case which was not a zoning case, and which had under consideration a law which had as a major theme that the owners of property affected were to be insured a "'reasonable return' on their investments." *Penn Central Transportation Co.*, 438 U.S. at 110.

The inclusion in the Landmarks Preservation Law of careful provisions with respect to "reasonable return" bespoke a recognition on the part of legislators that, unlike normal zoning legislation which pertained to all property owners in the

areas affected, the Landmarks Preservation Law would necessarily single out particular properties for attention and would impose burdens upon the owners of those properties which were not borne by others, even though those others would presumably benefit from the preservation of the landmarks. No similar "reasonable return" provisions are in effect with respect to the amendments to the Zoning Resolution. Nor, to my knowledge, are there any such "reasonable return" provisions contained in the zoning regulations treated in the decided cases.

A legislature could, of course, adopt such provisions with respect to zoning regulations, and if it did the property owners whose properties were affected by the regulations could take advantage of those provisions. That is not this case. Here, in the absence of statutory provision for "reasonable return," we deal with whether as a matter of constitutional law the application of the zoning amendments to plaintiffs' properties effected an unconstitutional deprivation.

Thus neither *Pennsylvania Coal Co.* nor *Penn Central Transportation Co.* has application to plaintiffs' situation. The amendments to the Zoning Resolution somewhat reduce the size of the buildings plaintiffs can build, but they each will be permitted to build very substantial buildings. There has not been a destruction of the rights of plaintiffs in their properties, and hence *Pennsylvania Coal Co.* does not control. Nor is there any provision in the Zoning Resolution reserving to plaintiffs the right to receive a "reasonable return" as there was in the New York City Landmarks Preservation Law, and hence *Penn Central Transportation Co.* does not control.

In *Agins* v. *Tiburon*, 447 U.S. 255 (1980), the plaintiffs had acquired five acres of land in the city of Tiburon, California, which they intended to use for residential development. Thereafter, the local zoning requirements were amended.

The effect of the amendment was to limit the residences which the plaintiffs could build on their property to five single family residences. The property owners sought a declaratory judgment that the ordinances were facially unconstitutional. They claimed that the rezoning prevented the development of the property for residential use and that the value of the property had been destroyed. The Supreme Court affirmed a holding of the California courts that "the zoning ordinances on their face do not take the appellants' property without just compensation." *Agins* v. *Tiburon*, 447 U.S. at 259.

The courts have repeatedly held that zoning regulations may cause substantial reductions in the value of property affected by them without entitling the owners of such properties to compensation, so long as the regulations promote the public welfare and the property, after application of the zoning regulations, remains "economically viable":

> Land use restrictions, reasonably related to the promotion of the health, safety, morals, or general welfare, have been repeatedly upheld even though the challenged regulations destroyed or adversely affected recognized real property interests or flatly prohibited the most beneficial use of the property.

William C. Haas v. *City & Cty. of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979).

In *Haas* the zoning regulations reduced the value of the plaintiff's property from about $2 million to $100,000. In *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), the zoning regulations reduced the value of plaintiff's property from $800,000 to $60,000. In *Pompa Const. Corp.* v. *City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983), plaintiffs acquired their tract for a sum of money in excess of $150,000 (706 F.2d at 420 n.2), and they claimed that its sale value after the zoning restrictions became effective would be only $34,000. The court did not find

that return failed to meet the standard of "economic viability":

> The record thus sustains the district court's determinations as to the specific viable uses of the tract, but even if appellants were only able to sell the Pompa tract for $34,000, the lowest amount suggested by their own witnesses, we would be hard put to say that that would be an inadequate return, failing to meet the requirement of economic viability. This is particularly so because appellants purchased the tract with full knowledge of the restrictions placed on use by the City's zoning ordinance.

Pompa Const. Corp., 706 F.2d at 424.

Plaintiffs ask the court to define "economic viability" not in terms of value, which would necessarily relate to the property itself, but in terms of return on the owner's investment in the property, which necessarily relates to the particular circumstances of the owner.

This approach might well be consistent with that set forth in *Penn Central Transportation Corp.* where, as noted above, the applicable legislation permitted, and may even have required, that approach. It is completely inconsistent, however, with constitutional decisions in zoning cases.

I have already referred to cases that stand for the proposition that a substantial reduction in the value of property as a result of the application of zoning regulations does not constitute a "taking" unless, as in *Pennsylvania Coal Co.*, the value of the property is substantially destroyed. If, as in *Hadacheck*, *Pompa*, and *Haas*, the value of the property is substantially reduced as a result of the application of zoning regulations, the return from that property — whether in income or in selling

price — will also be reduced. Return is necessarily a function of value.[4] Each one of the cases which has held that there may be a substantial reduction in value without a "taking" would necessarily also have held, if the question had been posed in that wise, that there may be a substantial reduction in the income from the property without a "taking" being implicated.

Plaintiffs' posture is precisely the same as that of the plaintiffs in *Hadacheck* and *Haas*. By reason of the limitations contained in a zoning regulation which substantially advances "legitimate state interests," their land has been substantially reduced in value. Since they may still build substantial structures on that land it still retains a substantial value, and the principles of *Pennsylvania Coal Co.* do not apply. Since there is no provision in the applicable zoning law for "reasonable return" they may not invoke the principles of *Penn Central Transportation Co.*, which were developed within the framework of a statute which provided for "reasonable return."

Nor can plaintiffs, by restating the impact of the amendments to the Zoning Resolution in terms of return upon investment rather than in terms of value, transform the impact of the zoning amendments on their properties into a "taking":

> Haas contends that its $1,900,000 loss in value of the property is not the full story because no use for the property remains which is "economically viable." ([*Penn Central Transportation Co.* v *New York City*, 438 U.S.] at 138 n. 36, 98 S.Ct. 2646). But Haas' argument that it cannot

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[4] "Return" is a term that may encompass more than income. Thus in *Pompa* the court, in discussing possible sales value after zoning amendments became effective, characterized the selling price as a "return," in terms of meeting "the requirement of economic viability." (*Pompa*, 706 F.2d at 424).

> recover its $2,000,000 investment by constructing low-rise apartment units on the land merely restates the undisputed fact that the value of the property in Haas' hands has been significantly diminished by the regulations. That the zoning restrictions prevent Haas from recovering its investment does not mean that they are constitutionally defective. Of course, Haas would not have paid as much for the property as it did if it had known that it would not be able to build high-rises on it. But its disappointed expectations in that regard cannot be turned into a taking, nor can Haas transform a regulation into a taking by recharacterizing the diminution of the value of its property as an inability to obtain a favorable return on its investment.

Haas v. *City & Cty. of San Francisco*, 605 F.2d 1117, 1120-21.

In sum, "economic viability" of a property affected by a zoning regulation means that that property must have economic utility to its owner after the zoning regulation takes effect. If application of the zoning regulation substantially destroys the value of the property, there will be a "taking." The production of income is one of the uses to which property can be put. A regulation "may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value." *French Inv. Co., Inc.* v. *City of New York*, 39 N.Y.2d 587, 594, 385 N.Y.S.2d 5, 8 (1976). But just as value can be reduced by the impact of a zoning regulation without implicating a "taking," so may the income produced by that property be reduced without implicating a "taking." Since return is a function of value, then to the extent that it is significant to look at the return on the property after the zoning amendment becomes effective, the return must be measured against the

value of the property at that time. Absent a provision which permits or requires resort to the owner's investment to determine "reasonable return", such as the provisions contained in the New York City Landmarks Preservation Act, the investment by the owner in the property is, in a zoning case, not relevant. No case involving zoning regulations has ever required a state to discriminate between property owners on the basis of how much the property owner paid for the property. The impact upon the property is the same whether or not it was recently purchased. Even if that impact is greatly to reduce the value of the property because a certain use is proscribed, or a dimension such as height or width is curtailed, there will be no "taking" so long as value and usefulness remain.

IV.

I have given consideration to the fact that the zoning amendments became effective only after plaintiffs acquired their property, and that they pruchased on the assumption that they would be able to build up to 18 FAR. These facts do not, in my judgment, have legal consequence.

Plaintiffs knew, when they purchased, that property in New York, including the property they purchased, was subject to zoning regulations. They also knew that those regulations were subject to change. They must be deemed, therefore, to have purchased the property with the awareness that a change in the Zoning Resolution which became effective before their building was undertaken might adversely affect their future plans.

To the extent that the amendments to the Zoning Resolution accomplish their objectives in the stabilization area by curbing the growth of congestion and the deterioration of the environment and by improving transportation facilities, all

property owners in the area, including plaintiffs, will benefit. The results will be reflected in an enhancement of the property values in the area, including those of plaintiff.

If plaintiffs' properties are exempted from the impact of the Zoning Resolution as amended, the purposes of the amendments will be to that extent frustrated. After thorough deliberation a policy was arrived at by the City in its governmental capacity that certain restrictions on building were necessary to the health of the stabilization area of the Special Midtown District and hence to the City as a whole. An exemption for these two plaintiffs would undoubtedly substantially reduce the effectiveness of the new provisions.

V.

I find that there are no issues of material fact, and that defendant is entitled to judgment dismissing the complaint.[5]

SO ORDERED

/s/VINCENT L. BRODERICK, U.S.D.J.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
February 7, 1984

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[5] Plaintiffs have also, in their complaint, invoked principles of pendent jurisdiction to challenge the Central Midtown District amendments to the Zoning Resolution on the bases that they violated state constitutional law (second cause of action), and that the draft and final environmental impact statements required by state law were deficient. With the dismissal of plaintiffs' federal constitutional challenge there is no federal cause of action to which the state claims append and they are also dismissed. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Filed February 10, 1984)

PARK AVENUE TOWER ASSOCIATES AND 40 EASTCO,
Plaintiffs,

82 CIVIL 6027 VLB

-against-

CITY OF NEW YORK,
Defendant.

JUDGMENT

Defendant having moved for an order pursuant to Rule 12(b)(6), Fed. R. of Civ. P., and the said motion having come before the Honorable Vincent L. Broderick, United States District Judge, and the Court thereafter on February 7, 1984, having handed down its memorandum order construing the motion as one for summary judgment and granting the said motion, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

/s/ RAYMOND F. BURGHARDT
Clerk

DATED: NEW YORK, N.Y.
February 10, 1984

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the Constitution of the United States, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Office - Supreme Court, U.S.
FILED
MAR 4 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

40 EASTCO,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 4, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Where a developer asserts a claim for a taking based upon a zoning change reducing by 28% the maximum permissible bulk for new buildings, are the developer's mere allegations that the change has defeated its expectations and rendered the return available on its property less-than-reasonable sufficient to survive a summary judgment motion, in light of the facts that:

(a) the developer makes no contention that its property has been rendered unprofitable or has lost most of its value;

(b) the developer concedes that the zoning change permits it to erect an office building of 30-odd stories and concedes that many nearby office buildings undertaken or completed shortly before the bulk reduction are of similar size;

(c) the developer acquired its parcel during the time in which the bulk reduction proposal was under active consideration; and

(d) the City never guaranteed the developer that it would be allowed to fulfill its plans?

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No. 84-1110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

40 EASTCO,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

(1)

In the late 1970's, government officials, business leaders, and members of the general public in New York City began to voice concern that the east side of midtown Manhattan was becoming

seriously overbuilt (A94).* They feared that consequential worsening street and traffic congestion, increasing strain upon mass transit facilities, and, in general, decreasing environmental quality threatened the continued viability of the area (A53, A55, A60-89). Unless overdevelopment was checked, they feared, inhospitable conditions would eventually induce businesses based in the area to leave the City and cause property values in the area to decline (A55). As the president of Macmillan Publishing, a corporation based in the east side midtown area stated: "Stabilization ... is more than simply good planning strategy. It is an

*Numerical references in parenthesis prefaced by the letter "A" are to pages of the Joint Appendix in the Second Circuit Court of Appeals. Those prefaced by "PA" are the petitioner's appendix in this Court.

absolute and immediate necessity if the [area] is to continue functioning as an effective business and commercial center" (A55).

In response to this concern, the New York City Department of City Planning undertook a comprehensive review of midtown Manhattan zoning regulations and, in 1980 and 1981, disseminated reports recommending that those regulations be amended so as to divide midtown into (1) stabilization, (2) growth, and (3) preservation sectors (A23-24, A30). The re-zoning plan called for reducing the maximum permissible bulk in sectors slated stabilization while increasing the maximum permissible bulk in sectors slated for growth (A24). The midtown east side region -- which had suffered from overbuilding -- was to be largely designated for stabilization, while the midtown west side region --in which development had lagged --was to be largely designated for growth (A24).

The Department of City Planning thereafter drafted appropriate amendments to the New York City Zoning Resolution and to the official New York City Zoning Map (A25). Among the stated goals of the amendments were the following:

- "[t]o strengthen the business core of Midtown Manhattan by improving the working and living environments"

- "[t]o stabilize the East Side of Manhattan and provide direction and incentives for expansion to the west and to the south"

- "[t]o link future Midtown growth and development to improved pedestrian circulation, improved pedestrian access to rapid transit facilities, and avoidance of conflicts with vehicular traffic"

- "[t]o promote the most desirable use of land and building development in accordance with the district plan for Midtown

> and thus conserve the value of land and buildings and thereby protect the City's tax revenues."

N.Y.C. Zoning Res. §81-00(a), (b), (c), (e).

The amendments were the subject of numerous public hearings and intensive review and debate (A25). They became effective on May 13, 1982, when they were approved by the New York City Board of Estimate (A25).

(2)

Petitioner 40 Eastco owns (partially in fee and partially as lessee) a parcel of land in the sector of the east side of midtown Manhattan designated for stabilization under the amended zoning regulations (A3). It acquired its parcel piecemeal between March of 1978 and June of 1982 -- during the time in which the zoning change was under active consideration (A10-12). Under the old zoning scheme, the maximum permissible floor area ratio

for new buildings on its parcel was 18 (A11).* An amended building permit issued in April of 1982 provided for a structure of nearly this maximum bulk (A11).

Under the revised zoning scheme, the maximum permissible floor area ratio for petitioner's parcel was reduced to 13 -- a reduction of 28% (A6). Because of the inconsistency between the permit and the revised bulk limitation, the City revoked petitioner's permit -- prior to construction -- upon adoption of the zoning change (A9).

---

*The bulk of a building is measured by its "floor area ratio," which is computed by dividing the total number of square feet "floor area" on all of its floors by the number of square feet in the zoning lot. "Floor area" is the gross area exclusive of elevator space, loading berth space, and other nonproductive space.

In September of 1982, petitioner commenced the instant action for declaratory and injunctive relief against the City in the United States District Court for the Southern District of New York (A1-21).* It contended, inter alia, that the zoning change unconstitutionally deprived it of property without just compensation by preventing construction of buildings of sufficient size to generate reasonable investment returns and consequently destroying the property's economicvalue (A10-12). Petitioner did not challenge the soundness of the zoning revision or contend that the revision was discriminatory. Further, while the complaint alleged that the zoningchange prevented realization of reasonable investment returns, conspicuously absent was any

*A similarly situated plaintiff, Park Avenue Tower Associates, joined in the suit. Although it also joined in 40 Eastco's appeal to the Court of Appeals, it apparently has decided against seeking a writ of certiorari.

allegation that the change entirely precluded the realization of profit.

In October of 1982, the City moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint for failure to state a claim upon which relief can be granted (A22). The City submitted an affidavit by a registered architect to the effect that the new zoning scheme permitted petitioner to construct a building of at least 30 stories and probably more (A31-32, A34). The architect further stated that the allowable 30-odd story office building was, in size, within the range of midtown office buildings that had recently been completed or upon which construction had recently begun under the old -- more generous --zoning scheme (A32). The City argued that the just compensation clause does not guarantee reasonable investment returns and that, in light of the facts attested to by the architect, the adverse economic impact of the zoning change upon

petitioner was not so devastating as to amount to a taking. Petitioner did not contest the architect's conclusions and, indeed, submitted no factual material whatsoever in response to the City's motion (Aiv). It relied soley upon a memorandum of law (Aiv).

In accordance with Rule 12(b)(6), Judge Vincent L. Broderick of the United States District Court for the Southern District of New York considered the factual material that the City had submitted and treated the City's motion as one for summary judgment (A101). Judge Broderick found that it was factually undisputed that the new zoning scheme permitted petitioner to construct a very substantial building (A107-8). In light of this fact, he held that the adverse economic impact upon petition was not so egregious as to constitute a taking, notwithstanding the unavailability of a reasonable investment return (A108-29).

Accordingly, Judge Broderick granted summary judgment in favor of the City.

(4)

In its appeal to the United States Court of Appeals for the Second Circuit, petitioner argued that the District Court had employed an incorrect legal standard, since any zoning change that prevents realization of a reasonable investment return and frustrates investment-backed expectations constitutes a taking as a matter of law. In addition, it contended that summary judgment was improperly granted because of the existence of an issue of material fact as to the extent of its economic harm.

While acknowledging that a zoning change that destroys economic viability may constitute a taking, the Court of Appeals rejected petitioner's assertion that economic viability signifies reasonable profitability, citing this Court's statement in Andrus

v. Allard, 444 U.S. 51, 66 (1979), that "loss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a taking claim (PA-6a-8a)." Petitioner's position, the Court of Appeals stated, is likewise inconsistent with several of that Court's own cases holding that, in analyzing economic impact for taking purposes, it is not profitability but marketability that is determinative (PA-8a-9a). Furthermore, the Court stated, petitioner's argument is further undermined by the legion of cases that have upheld as against taking claims regulations that devalued property by as much as 90% (PA-9a). Common sense, the Court stated, also militates against petitioner's position, since that approach unfairly rewards those who overpay for their property and encourage frequent sales of property at each appreciation in order to lock in progressively larger investment values (PA-10a).

Having rejected petitioner's legal theory, the Court of Appeals next turned to the question of whether summary judgment was nevertheless improperly granted because of the existence of an issue of material fact as to the presence of a taking (PA-11a). Petitioner's complaint, the Court stated, did not allege that the zoning change entirely prevented petitioner from profiting on its investment (PA-11a). Rather, its only pertinent factual allegation was that the zoning change prevented realization of a reasonable investment return and hence destroyed the property's economic value (PA-11a). Since the first allegation was insufficient to make out a taking claim, since the second was rebutted by the architect's affidavit that the City submitted, and since petitioner submitted no factual material to counter the architect's conclusions, there was no reason why summary

judgment should not have been granted (PA-11a-12a).

(5)

On October 24, 1984, petitioner, citing this Court's grant of certiorari in Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir.), cert. granted, 53 U.S.L.W. 3202 (1984), moved in the Court of Appeals for an order extending its time to petition that Court for rehearing until 14 days after decision by this Court of Hamilton Bank. By order entered on November 1, 1984, Judge Lawrence W. Pierce denied the motion, stating: "Hamilton appears not be controlling."

REASONS FOR DENYING A WRIT OF CERTIORARI

POINT I

THE COURT OF APPEALS FOLLOWED THE APPLICABLE PRINCIPLES OF LAW ESTABLISHED BY THIS COURT IN ITS PRIOR DECISIONS IN VIEWNG PETITIONER'S ALLEGATIONS AS INSUFFICIENT TO BAR THE AWARD OF SUMMARY JUDGMENT AGAINST PETITIONER.

(1)

Petitioner contends that the Court of Appeals departed from this Court's precedents in slighting petitioner's allegations that the zoning change (1) prevented petitioner from reaping a reasonable investment return and (2) frustrated petitioner's investment expectations. In fact, this Court's precedents clearly establish that one cannot make out a colorable taking claim by bare showings of decreased profitability and disappointed expectations.

It is certainly true that economic harm is a pertinent consideration in judging whether regulatory action effects a taking. See, e.g., Ruckelshaus v. Monsanto Co., _____ U.S. _____, 104 S. Ct. 2862, 2874 (1984). To warrant a taking finding, however, economic harm must be exceedingly severe. Mere loss of profitability -- let alone the less severe loss of reasonable profitability claimed by petitioner -- hardly suffices. As this Court stated in Andrus v. Allard, 444 U.S. 51 66 (1979), in explaining why a regulation entirely prohibiting certain commerce in artifacts did not effect a taking even if it prevented traders from deriving economic benefit from their artifacts:

> [L]oss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further,

> perhaps because of its uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

This Court has also rejected taking challenges to a brickmaking restriction that devalued commercial property by 93% in Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915), and to an industrial use restriction that caused a 75% property devaluation in Village of Euclid v. Ambler Realty Corp., 272 U.S. 365, 384 (1926). It is unthinkable that the properties in those cases could have withstood such enormous diminutions in value while retaining reasonable profitability.

Moreover, the implications of the proposition that retention of reasonable profitability is the sine qua non for rejection of a taking claim, are astounding. Every regulatory action by government -- ranging from the establishment of container

requirements for the shipment of aardvarks to the promulgation of insecticide restrictions for zucchini -- has an adverse effect upon the profitability of some enterprises. If petitioner's theory were the law, then any enterprise whose pre-regulation profitability is no more than "reasonable" and whose profitability is at all adversely affected by regulation could claim a taking.

Petitioner's argument concerning interference with investment expectations was also properly found to be deficient by the Court of Appeals. Noticeably absent from its petition is any reference to Ruckelshaus v. Monsanto Co., supra, which contains this Court's most recent and most detailed exposition of how investment expectations factor in a taking analysis. Among the issues in Monsanto was whether the use by the Environmental Protection Agency of Monsanto's trade secret pesticide data for the benefit of competitors as well

as EPA's public disclosure of such data effected a taking of Monsanto's property. After noting that "'interference with reasonable investment-backed expectations'" is a factor in taking analysis, 104 S.Ct. at 2875 (quoting another case), the Court proceeded to apply this factor to the different factual situations that prevailed during three different periods in which Monsanto submitted data to the EPA. The law in effect during one submission period, the Court stated, expressly provided for data use and disclosure. Id. Accordingly, the Court held that Monsanto had no reasonable investment-backed expectations of secrecy as to data submitted during that period. Id. The Court stated:

> If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when

> EPA acts to use or disclose the data in a manner that was authorized by law at the time of submission.

Id. Nor, the Court held, was there an interference with reasonable investment-backed expectations as to data submitted during a second period, in which the applicable law neither expressly permitted nor expressly forbade disclosure. Id. at 2876. As to that period, the Court reasoned:

> [A]bsent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure . . ., upon focusing on the issue, would find disclosure to be in the public interest.

Id. at 2876. With regard to data submitted during a third period, in which applicable law prohibited disclosure, a taking finding was warranted, the Court held. Id at 2877. The Court reasoned, "This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." Id. at 2878.

Thus, the teaching of Monsanto is that to qualify as reasonable investment-baked expectations for taking purposes, one's expectations must be founded upon an explicit governmental guarantee. In the case at bar, petitioner can point to no such guarantee. To be sure, petitioner may have had hopes when it acquired its property that the applicable zoning regulations would not be changed. However, given the fact that the law then in effect and still in effect specifically permits zoning changes, see N.Y.C. Charter § 200, any such hopes were no more reasonable then hopes of

confidentiality that Monsanto may have harbored as to data submitted during the first of the above-discussed three periods. Nor can petitioner rely upon the fact that the City issued it building permits. Under long-established New York law, issuance of a building permit confers no rights that survive a subsequent inconsistent zoning change, unless, between issuance of the permit and passage of the change, the holder completes a substantial portion of the planned construction in reasonable reliance upon the permit. See Sibarco Stations, Inc. v. Town Board of Vestal, 24 NY2d 900, 249 NE2d 478 (1969); Smith v. Spiegel & Sons, Inc., 31 AD2d 819, 298 NYS2d 47 (2d Dep't), aff'd, 24 NY2d 920, 249 NE2d 763 (1969); Gramatan Hills Manor, Inc. v. Manganiello, 213 NYS2d 617 (Sup. Ct. West. Co. 1961) (n.o.r.); Riverdale Comm. Planning Ass'n v. Crinnion, 133 NYS 2d 706 (Sup. Ct. Bronx Co. 1954) (n.o.r.), aff'd, 285 App. Div. 1047, 141 NYS2d

510 (1st Dep't 1955). Given this principle and given the fact that petitioner did not perform the requisite substantial construction, the permits can hardly be construed as a guarantee against re-zoning.

(2)

Entirely ignoring this Court's decisions in Andrus and Monsanto, petitioner seeks to establish that its allegations were sufficient to make out a colorable taking claim by citing this Court's earlier decisions in Agins v. City of Tiburon, 447 U.S. 255 (1980), and Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

Nothing in those decisions supports petitioner's view. It is true that this Court stated in Agins that a zoning law that snuffs out "economic viability" effects a taking. 447 U.S. at 260. Nowhere in the decision, however, is "economic viability" equated with "reasonable profitability." Furthermore, the

decision nowhere implies that the phrase "reasonable investment expectations" embraces ill-founded subjective desires.

Penn Central likewise does not aid petitioner. That case identified the "primary expectation" protected by the just compensation clause as the expectation of continuation of long-existing uses. 438 U.S. at 136. Nor do the opinion's references to reasonable return substantiate petitioner's position. Penn Central came to the Supreme Court with a finding by the State Court of Appeals that the challenged ordinance permitted a reasonable return. The Court of Appeals was obliged to resolve the question of whether a reasonable return was available because the ordinance in question explicitly guaranteed property owners the right to earn a reasonable return. 438 U.S. at 110, 112n. 13. It is true that this Court did not wholly ignore the Court of Appeals' finding and, indeed, cited the

finding in support of its conclusion that no taking had occurred. See id., at 136. However, this Court's citation of the availability of a reasonable return as one among the many factors militating against a taking finding hardly suggests that the availability of a reasonable return is necessary to avoid a taking finding. Indeed, petitioner's inference is no more sound than the inference that all non-millionaires qualify for public assistance from a case citing the fact that an individual is a millionaire in upholding that person's ineligibility for public assistance.

Even if Agins and Penn Central are at all ambiguous concerning the significance of reasonable profitability and frustration of expectations for taking purposes, the subsequent Andrus and Monsanto cases -- which must be deemed to reflect this Court's current thinking on taking jurisprudence -- explode petitioner's interpretation.

Petitioner assails the Court of Appeals for suggesting that, in assessing economic harm for taking purposes, retention of some market value is the primary consideration. The Court of Appeals' statement is in accord with this Court's precedents. Thus, for example, this Court stated in Ruckelshaus v. Monsanto Co. that "'[governmental] action short of acquisition of title or occupancy'" constitutes a taking only "'if its effects are so complete as to deprive the owner of all or most of his interest.'" 104 S.Ct. at 2874 (emphasis added) , quoting from United States v. General Motors Corp., 323 U.S. 373, 378 (1945). Equally telling is this Court's summarization in Penn Central Transp. Co. v. City of New York, supra of three precedents in which taking claims were upheld. It stated that the statute in one case "had nearly the same effect as the complete destruction of rights claimant had

reserved." 438 U.S. at 127 (emphasis added; citation omitted). In addition, in the same paragraph, it referred to a second case with the capsulized description "Government's complete destruction of a materialman's lien in certain property held a "'taking'" and to a third case with the capsulized description "if height restriction makes property wholly useless ... compensation is required." 438 U.S. at 128 (emphasis added; citations omitted). See also Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (taking only when deprivation of something "essential to the use or economic value of ... property").

In any event, even if the test suggested by the Court of Appeals is overly harsh, we fail to see how petitioner is aggrieved. Petitioner concedes the impelling need for the zoning change in order to preserve the desirability of the east side of midtown Manhattan. Further, petitioner concedes that the

zoning change permits it to construct an office building of 30-odd stories -- a building whose size is within the range of recently undertaken nearby office buildings. Moreover, petitioner makes no allegation that the zoning change deprived its property of most of its value. For that matter, petitioner does not even allege that the zoning change rendered its property unprofitable. Rather, petitioner's only allegations are that the zoning change interfered with its plans and prevented it from realizing a "reasonable" rate of return. Under these circumstances, the degree of harm sustained by petitioner pales by comparison with the harm involved in cases such as Hadacheck v. Sebastian, supra, which rejected taking claims. Accordingly, petitioner's allegations could not possibly make out a colorable taking claim even under a somewhat more liberal standard.

POINT II

THE HOLDING OF THE COURT OF APPEALS DOES NOT CONFLICT WITH HAMILTON BANK V. WILLIAMSON COUNTY REGIONAL PLANNING COMM'N. FURTHER, SINCE THERE IS NO REASON TO BELIEVE THAT THIS COURT'S DECISION IN HAMILTON WILL AFFECT THE OUTCOME IN THE CASE AT BAR, THE PETITION SHOULD NOT BE HELD IN ABEYANCE BUT RATHER SHOULD BE DENIED OIUTRIGHT.

(1)

Petitioner glibly asserts that "[t]he standard for determining whether an unconstitutional taking occurred applied by the Sixth Circuit [in Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir.), cert. granted, 53 U.S.L.W. 3202 (1984)] was whether the owner could develop its property under the new zoning at a reasonable return or profit." Pet. at 5. Petitoner does not cite to any page of the Hamilton opinion for this proposition. The reason for the lack of

citation is that the proposition finds no support in the opinion. On the contrary, the standard that the Hamilton Court employed was one quite akin to that employed by the Court of Appeals in the case at bar -- retention of market value. Thus, the Hamilton Court stated:

> The appraiser's conclusion, therefore, was that the land had no remaining significant value. As there was convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use.

729 F.2d at 406. Similarly, the Hamilton Court took pains to note:

> Since the evidence is that the land owned by Hamilton was left with no remaining significant value, the case is distinguishable from those cases in which mere diminutions in value have been held not to constitute taking because economically viable use remained.

Id. at 406 n.4 (emphasis in original).

Petitioner also asserts that Hamilton's property must necessarily have retained market value and that the Hamilton Court's upholding of a taking finding notwithstanding such a retention conflicts with the view of the Court of Appeals in the case at bar. Pet. at 6. Petitioner apparently is unaware of the fact that Hamilton offered substantial testimony to the effect that its property retained no significant value and that its attempts at selling the property had been futile. See Brief for Respondent at 19-20, Williamson County Regional Planning Comm'n v. Hamilton Bank, No. 84-4 (Sup. Ct.). Given the fact that a jury found in Hamilton's favor on the economic viability issue, 729 F.2d at 404, the operative standard of review required that the Sixth Circuit Court of Appeals view the evidence in the light most favorable to Hamilton and give it the benefit of all reasonable

inferences. See Continental Oil Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962). Petitioner's premise that Hamilton's property retained marketability is, accordingly, false.

Finally, petitioner asserts that the Hamilton Court accorded far greater weight to investment expectations then did the Court of Appeals in the case at bar. Pet. at 5. Hamilton's expectations were, however, far more solidly grounded than those of petitioner in the case at bar. Undergirding Hamilton's expectations was the fact that during a six-year period in which the developers had built roads, installed utility lines, and spent some five million dollars on property improvements, the locality approved the developers' plans on numerous occasions. 729 F.2d at 403. Further, the locality continued to approve the developer's plans following passage of the zoning change. Id. Indeed, not until three years after the zoning change became

effective did the locality give the developers any inkling that the change would present an obstacle to their goals. Id. In contrast, in the case at bar, the City never gave petitioner reason to believe that the zoning change would not interfere with its project. Indeed, the City cancelled petitioner's permit immediately upon passage of the zoning change. Furthermore, unlike in Hamilton, petitioner in the case at bar essentially engaged in speculation by assembling its properties during the time in which the zoning change was being publicly discussed. As a sophisticated developer, it must have known that the possibility existed that the zoning change would pass and that its plans would accordingly not come to fruition. Moreover, unlike the developers in Hamilton Bank, petitioner did not undertake substantial construction in the aftermath of governmental approval.

(2)

Petitioner's request that this Court defer action on its petition until after decision of Hamilton Bank should be denied because there is no likelihood that that decision will alter the outcome in the case at bar.

To begin with, inasmuch as the result that the petitioner Planning Commission seeks in Hamilton Bank is reinstatement of the j.n.o.v. in its favor granted by the District Court but upset by the Court of Appeals (see Br. for Pet. at 34, Williamson County Regional Planning Comm'n v. Hamilton Bank, No. 84-4 (Sup. Ct.)), the major focus of this Court's opinion will necessarily be whether the District Court was correct in holding that the impossibility of a taking finding when there is an estoppel finding and, in any event, the unavailability of damages for a temporary taking required the granting of a j.n.o.v.. Should this Court side with the District Court on either issue, its inquiry will be over, as

such a ruling would give the Planning Commission the result that it seeks. Accordingly, there is little chance that Hamilton Bank will even address the economic burden issue. Further, even if the Court addresses the issue, the strong possibility exists that it will not provide an elaborate treatment but will dispose of the issue summarily on the basis of the evidence that the property retained no significant value and that Hamilton Bank acquired a vested right -- evidence that distinguishes Hamilton Bank from the case at bar.

Even if this Court should elect in Hamilton Bank to provide a detailed treatment of the minimum economic burden necessary to establish a taking, there is no reason to believe that its treatment will be beneficial to petitioner in the case at bar. Given this court's recent Andrus and Monsanto decisions, which together contained a total of only one partial dissent, Hamilton Bank

would have to effect a monumental change in taking jurisprudence to render petitioner's mere claims of less-than-reasonable profitability and frustration of subjective expectations sufficient to make out a taking claim in the face of its freedom to erect a large building no smaller than many nearby ones. While Hamilton Bank may clarify the law, there is little likelihood that it will revolutionize it.*

*An additional reason why the petition should be denied is that the issue presented is not ripe for review. A property owner that has not availed itself of "opportunities. . . to . . . obtain relief by requesting a variance" cannot challenge the constitutionality under the just compensation clause of the application of a zoning change to particular property. Hodel v. Virginia Survace Mining and Reclamation Ass'n, 452 U.S. 264, 295-97 (1981). In the case at bar, petitioner might well have applied to the New York City Board of Standard and Appeals for a variance. See N.Y.C. Charter §666(b); N.Y.C. Zoning Res. §§72-01, 72-21. Indeed, the Board is legally required to grant a variance where a property owner establishes that a zoning change prevents realization of a reasonable return, provided that certain other criteria are satisfied. Id. § 72-21. It is undisputed that petitioner made no such application.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

March 4, 1985

Respectfully submitted,

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